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ABSTRACT

In light of two cases soon to be decided by the U.S. Supreme Court--"Bob Jones University v. United States" and "Goldsboro Christian Schools, Inc. v. United States"--this monograph discusses the issue of freedom of religion and racially discriminatory private religious schools. After noting the statutory basis of tax-exempt status granted by the U.S. Internal Revenue Service (IRS), the author explains the historical underpinnings of the fundamental national policy against racial discrimination and describes the events leading up to the IRS decision to deny tax-exempt status to racially discriminatory private schools. The monograph then discusses the constitutional conflict that arises when religious beliefs violate the national policy against racial discrimination. The author next explores the establishment clause problem that occurs when government treats one religious institution differently than another. Finally, he discusses section 501 (c)(3) of the IRS code (which grants tax-exempt status to charitable organizations) and traces IRS authority and policies regarding the granting and, later, denial of tax-exempt status to private religious schools discriminating on the basis of race. (Author/RW)

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Discriminatory Religious Schools and Tax Exempt Status

United States Commission on Civil Rights
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- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
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Summary

The question of whether schools—religious or nonsectarian—that discriminate on the basis of race should be granted tax-exempt status has recently been the source of extensive public debate.

The Commission's interest in the Federal Government's tax policies concerning private schools whose operations conflict with the constitutionally based national policy of eliminating segregated education predates the current controversy. In a 1967 report, *Southern School Desegregation 1966–67,* the Commission reviewed the progress of Southern and Border State school districts in complying with the Supreme Court's decision in *Brown* v. *Board of Education.* In assessing school desegregation, it also examined the development of private schools to circumvent public school desegregation. The 1967 report concluded:

> Many private segregated schools attended exclusively by white students have been established in the South in response to public school desegregation. In some districts such schools have drained from the public schools most or all of the white students and many white faculty members.

The Commission noted that many of the racially segregated private schools established to circumvent public school desegregation had been granted tax-exempt status by the Internal Revenue Service, and that Federal tax exemptions constituted a form of indirect government assistance.

Much has happened since the issuance of that report.

Against the backdrop of *Brown,* subsequent U.S. Supreme Court school desegregation cases, and the passage of the Civil Rights Act of 1964, the Internal Revenue Service (IRS), in 1970, announced it could "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor [could] it treat gifts to such schools as charitable deductions for income tax purposes" and explained that "[a]n organization seeking exemption as being organized exclusively for educational purposes, within the meaning of section 501(c)(3) and section 170, must meet the test of being 'charitable' in the common law sense."

This interpretation of the Internal Revenue Code followed litigation to force the IRS to deny tax exemptions to segregated private schools and remained in effect until 1982. It was then, in the context of developing the Federal Government's position to be taken in *Bob Jones University* v. *United States* and *Goldsboro Christian Schools, Inc.* v. *United States* pending before the U.S. Supreme Court, that the Department of Treasury, with the advice of the Department of Justice, reversed its interpretation of the law. On January 8, 1982, the Department announced that it would no longer revoke or deny tax-exempt status for religious, charitable, educational, or scientific organizations on the grounds of their nonconformity with fundamental policies—including the national policy against racial discrimination. The administration maintained that the enactment of a separate statute, enabling the IRS to deny tax-exempt status to schools that practice racial discrimination, was required.

The U.S. Commission on Civil Rights strongly disagrees with this interpretation of the law and so testified in hearings conducted earlier this year before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. In the Commission's view, the Constitution, Title VI of the Civil

Rights Act of 1964, and the IRS Code support the policy of denying tax-exempt status to private schools, religious or nonsectarian, that engage in racial discrimination. Decisions of the Federal courts interpreting the Constitution and Federal law not only support this view but require that the IRS initiate effective enforcement procedures to deny tax-exempt status to such racially discriminatory schools. Recently, in response to a request from Senator John Glenn (D–Ohio) for the Commission's comments on specific legislation in this area pending before Congress, the Commission reiterated its views on this issue.

Because of the continuing public debate on the issue of granting tax-exempt status to private religious or nonsectarian schools that discriminate on the basis of race, the Commission has decided to release this monograph on the subject. The monograph explains the historical underpinnings of the fundamental national policy against racial discrimination. It also discusses the constitutional conflict that arises when a sincerely held religious belief violates this fundamental policy and the establishment clause problem arising when one religious institution is treated differently by the government than another religious institution. Finally, the monograph traces the Internal Revenue Service's authority and policies regarding the granting of tax-exempt status to schools that discriminate on the basis of race.

Over the course of the past several months, the Commission has also been developing a statement on religious discrimination, *Religion in the Constitution: A Delicate Balance,* that will address other major issues arising under the first amendment's mandates forbidding the government from passing any law establishing a religion or prohibiting the free exercise of religion. The common themes uniting the subjects discussed in that statement are similar to those raised by the issue of granting tax-exempt status to private religious schools that discriminate on the basis of race: the free exercise of religion is not absolute and must be balanced against other competing interests and the prohibition against government establishment of religion is also not absolute and can be modified when, and only when, the inability of persons to practice their religions subject to government control or jurisdiction is at stake.

Freedom of Religion and Racially Discriminatory Private Religious Schools

"In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."
James Madison, Federalist Paper No. 51, as reprinted in Charles A. Beard, *The Enduring Federalist* (1948), pp. 224, 227.

On October 13, 1981, the Supreme Court of the United States agreed to hear two cases, *Bob Jones University* v. *United States* and *Goldsboro Christian Schools, Inc.* v. *United States*,[1] raising the issue of whether the denial or revocation of tax-exempt status to private religious schools that engage in racial discrimination based on a sincerely held religious belief is contrary to the Internal Revenue Code of 1954[2] and violates the religion clauses of the first amendment to the Constitution.[3]

Bob Jones University, though not affiliated with any particular religious denomination, adheres to fundamentalist religious beliefs in the education it provides to 5,000 students in classes ranging from kindergarten to college and graduate school. These religious beliefs strictly prohibit interracial dating and marriage. The university exercised this belief by first prohibiting black students from enrolling in the institution and then later admitting only married black students. Following the decisions of the U.S. Court of Appeals for the Fourth Circuit in *Runyon v. McCrary*[4] and *Bob Jones University* v. *Johnson*,[5] Bob Jones University again amended its admissions policy. Since May 1975, the school has permitted black students to enroll. However, students who advocate or engage in interracial dating or marriage are subject to expulsion under a disciplinary rule adopted at that time.[6]

Goldsboro Christian Schools, founded in 1963, is a private, fundamentalist religious school seeking "to provide a private school education in a religious setting." It has received financial support, assistance of personnel, and the use of the physical plant of the Second Baptist Church of Goldsboro, North Carolina, with which it is affiliated. Since it opened its doors, the

[1] Bob Jones University v. United States, 468 F. Supp. 890 (D.S.C. 1978), *rev'd* 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 81–3); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd per curiam* No. 80–1473 (4th Cir. Feb. 24, 1981) (unpublished opinion), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 81–1).

[2] I.R.C. §501(c)(3).

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I.

[4] 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976).

[5] 529 F.2d 514 (4th Cir. 1975) (upholding an administrative ruling terminating all Veterans Administration assistance to the university due to its racially discriminatory admissions policy).

[6] The disciplinary rule implemented by the university reads as follows:

There is to be no interracial dating.

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

Bob Jones University v. United States, 639 F.2d, 147, 149 (4th Cir. 1980).

school has absolutely prohibited the enrollment of black students.[7]

Bob Jones University and Goldsboro Christian Schools, Inc., assert that the U.S. Court of Appeals for the Fourth Circuit, in requiring them to meet a condition of nondiscrimination on the basis of race, erroneously applied the tax-exemption provisions of the Internal Revenue Code of 1954, infringed on their first amendment right to the free exercise of religion by imposing the nondiscrimination requirement, and violated the establishment clause of the first amendment by favoring religions that do not hold a religious belief opposing interracial dating and marriage.

Tax Exemptions Under the Internal Revenue Code

Since 1894, the Federal income tax laws have contained an exemption for certain charitable organizations.[8] The current Internal Revenue Code provides for tax-exempt status for the following organizations:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition. . ., or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. . ., and which does not participate in, or intervene in. . ., any political campaign on behalf of any candidate for public office.[9]

Tax deductions are permitted for contributions to §501(c)(3) tax-exempt charitable organizations, with the exception of the "testing for public safety" category.[10]

Constitutionally Based Policy Against Racial Discrimination in Education

On May 17, 1954, the Supreme Court of the United States, in *Brown* v. *Board of Education,*[11] held that segregated public school systems, notwithstanding the "separate but equal" doctrine of *Plessy* v. *Ferguson,*[12] were violating the equal protection clause of the 14th amendment.[13] Although the Supreme Court decisions invalidating segregation in higher education[14] during the previous two decades should have signaled the result in *Brown* to the segregationists, they were unprepared for the 1954 pronouncement of the Court. Despite the landmark decision, the system of segregated public schools persisted. Southern legislatures enacted numerous statutes not only to preserve public school segregation but also to construct an alternative—a private, segregated educational system.[15]

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[7] Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1214–17 (E.D.N.C. 1977).

[8] Tariff Act of 1894, ch. 349, §32, 28 Stat. 556; Tariff Act of 1909, ch. 6, §38, 36 Stat. 113; Revenue Act of 1916, ch. 463, §11(a)(6), 39 Stat. 766; Revenue Act of 1918, ch. 18, §231(6), 40 Stat. 1076; Revenue Act of 1921, ch. 136, §231(6), 42 Stat. 253; Revenue Act of 1924, ch. 234, §231(6), 43 Stat. 282; Revenue Act of 1926, ch. 27, §231(6), 44 Stat. 40; Revenue Act of 1928, ch. 852, §103(6), 45 Stat. 813; Revenue Act of 1932, ch. 209, §103(6), 47 Stat. 193; Revenue Act of 1934, ch. 277, §103(6), 48 Stat. 700, Revenue Act of 1936, ch. 690, §101(6), 49 Stat. 1674; Revenue Act of 1938, ch. 289, §101(6), 52 Stat. 481; Internal Revenue Code of 1939, §101(6); Internal Revenue Code of 1954, §501(c)(3).

[9] I.R.C. §§501(a), (c)(3).

[10] I.R.C. §170(c). Similar deductions are provided for gifts and for estate bequests or transfers to §501(c)(3) tax-exempt organizations. I.R.C. §§2055(a)(2), 2522(a)(2).

[11] 347 U.S. 483 (1954). The Supreme Court consolidated cases from Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. The four State cases alleged that *de jure* segregation violated the equal protection clause of the 14th amendment. The District of Columbia case, Bolling v. Sharpe, 347 U.S. 497 (1954), alleged that segregation violated fifth amendment due process.

[12] In Plessy v. Ferguson, 163 U.S. 537 (1896), the Court held that no 13th or 14th amendment violation was created by a Louisiana statute mandating railroad companies to provide "equal but separate" passenger train accommodations for blacks and whites. *Id.* at 543, 551.

For a more detailed discussion of the history of the Civil War amendments—the 13th, 14th, and 15th amendments to the Constitution—*see* U.S., Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (June 1981).

[13] The Court found that dual school systems were "inherently unequal." 347 U.S. 483, 495. In so holding, the Court specifically found that segregation stamped black children with a badge of inferiority that would follow them throughout their lifetime:

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

347 U.S. 483, 494 (1954).

[14] *See,e.g.,* Missouri ex rel. Gaines v. Canada 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[15] Within 6 years of the *Brown* decision, 10 States enacted legislation either mandating or permitting the closing of local schools to avoid desegregation; four States passed laws to withhold State funds from schools that complied with court orders to desegregate their institutions; and six States enacted legislation relaxing or eliminating compulsory attendance laws.

By 1960, three States enacted legislation authorizing the sale or lease of public property to private parties to avoid desegregation; three States passed laws to facilitate the establishment of private schools; three States enacted legislation providing State tax credits for private schools, or where public schools were closed, to prevent desegregation; five States authorized tuition grants for private school students; and four States enacted laws to protect the

The need for private schools to accommodate white students fleeing from the desegregating school systems really did not materialize until the late 1960s. At that time, the Supreme Court, realizing that State and local officials were using various techniques and administrative practices such as State pupil assignment laws and local "freedom of choice" plans to frustrate the command of *Brown II* to desegregate the Nation's public schools "with all deliberate speed,"[16] moved to end dilatory tactics preserving segregated dual school systems. The Court ruled that school boards have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[17] It further stated that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[18]

The Court's decision mandating the establishment of unitary school systems led to "a massive white withdrawal from the public schools and a flurry of activity in organizing and expanding private ones."[19] Churches in many areas proved to be a natural organizing center for individuals seeking to establish segregation academies,[20] resulting in a "startling growth of Christian segregationist academies that can be seen throughout the South."[21]

Tax Exemptions and Racially Discriminatory Private Schools

Before 1970, any otherwise qualified private school that engaged in racially discriminatory practices could obtain tax-exempt status, according to IRS policy, if it did not receive aid from a State or one of its political subdivisions whereby its operation was in violation of the Constitution or existing Federal law.[22] However, a private school could still be liable for damages resulting from its racially discriminatory practices.[23]

To contest the continued Federal support of racially discriminatory private schools under that the IRS policy, black parents and their minor children attending Mississippi public schools filed a class action suit on May 21, 1969, to prohibit Federal tax exemptions to private schools in Mississippi that refused admission to black students based on their race or color.[24] They specifically sought injunctive relief (1) to prohibit the Secretary of the Treasury and the Commissioner for Internal Revenue from approving applications submitted by racially discriminatory private schools seeking tax-exempt status and (2) to require the Secretary and the Commissioner to rescind and revoke the tax-exempt status previously granted to private schools that excluded blacks.[25] Soon after the initiation of the lawsuit, the court granted a motion to intervene filed by parents and children who were representative of individuals either supporting or attending all-white, tax-exempt private schools that

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retirement benefits of public school teachers transferring to private schools as a result of desegregation. *Hearings on IRS Tax Exemptions and Segregated Private Schools before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (Jan. 28, 1982) (Appendix to statement of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, citing Southern Education Reporting Service, *Statistical Summary of School Segregation–Desegregation in the Southern and Border States* (May 1961)). *See* Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436 (1973), and *see generally*, David Nevin and Robert Bills, *The Schools That Fear Built: Segregationist Academies in the South* (1976) (hereafter cited as Nevin & Bills, *The Schools That Fear Built).*

[16] 349 U.S. 294 (1955).

[17] *See* Green v. County School Board of New Kent County, 391 U.S. 430, 437–438 (1968).

[18] *Id.* at 439. The *Green* mandate for school boards to promptly adopt and effectuate a unitary school system was reiterated by the Court in its subsequent decisions in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
For a more detailed discussion of Supreme Court decisions and recent congressional and executive branch actions with respect to desegregating the Nation's public schools, *see* U.S., Commission on Civil Rights, *With All Deliberate Speed: 1954–197?* (November 1981).

[19] Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436, 1441. *See also* Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969); Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); Brown v. South Carolina Board of Education, 296 F. Supp. 199 (D.S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); Wallace v. United States, 389 U.S. 215 (1967) *(per curiam), aff'g* Lee v. Macon County Board of Education, 267 F. Supp 458 (M.D. Ala. 1967); Griffin v. State Board of Education, 239 F. Supp. 560 (E.D. Va. 1965); Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

[20] Nevin & Bills, *The Schools That Fear Built*, p. 7.

[21] Ibid., p. 9.

[22] IRS News Release, Aug. 2, 1967, *reprinted in Hearings on Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 9 (1979).

[23] *See* Runyon v. McCrary, 427 U.S. 160 (1976).

[24] Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.*, Coit v. Green, 404 U.S. 997 (1971).

[25] Green v. Kennedy, 309 F. Supp. 1127, 1129–30 (D.D.C. 1970). At the time of this consideration of the request for a preliminary injunction, David M. Kennedy was the Secretary of the Treasury. He was later succeeded by John B. Connally.

provided an alternative educational system for white students seeking to avoid integrated public schools.[26]

On January 12, 1970, the Federal District Court for the District of Columbia issued a preliminary injunction restraining the Secretary of the Treasury and the Commissioner for Internal Revenue from approving any pending or future applications for tax-exempt status from private schools in Mississippi "unless they first affirmatively determine. . .that the applicant school is not a part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools."[27] Six months later, the Internal Revenue Service issued two news releases declaring that "it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes."[28]

The *Green* court held that §501(c)(3) of the Internal Revenue Code must be read in light of Federal civil rights legislation and the overriding national policy against segregation in education. In issuing its opinion, the court said that "[t]he national policy against support for segregated education emerged in provisions adopted by the Congress in the Civil Rights Act of 1964" (Title VI) and that the applying of Title VI itself to tax exemptions and deductions "is an expression of Federal policy against Federal support for private schools that practice racial discrimination."[29] The U.S. District Court for the District of Columbia declared that:

> The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.[30]

The court concluded that any contrary interpretation of the legal obligations of the Internal Revenue Service "would raise serious constitutional questions":

> Clearly, the Federal Government could not under the Constitution give direct financial aid to schools practicing racial discrimination. But tax exemptions and deductions certainly constitute a Federal Government benefit and support. While that support is indirect, and is in the nature of a matching grant rather than an unconditional grant, it would be difficult indeed to establish that such support can be provided consistently with the Constitution.[31]

The court's order was limited to Mississippi, but the opinion makes clear that the IRS could apply the principles nationwide. As the court stated:

> [t]o obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our decree is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class.[32]

In 1976, however, the parents of black public school students in several States sought to extend application of the *Green* decision nationwide by filing suit against the Internal Revenue Service,[33] alleging that the IRS had to limit tax-exempt status under §501(c)(3) to racially nondiscriminatory private schools. The Federal district court dismissed the complaint as nonjusticiable,[34] but the court of appeals reversed that decision.[35] Petitions for a *writ of certiorari*[36] were subsequently filed with the Supreme Court.[37]

When the *Green* case was reopened in 1976, it was consolidated with the *Wright* case. *Green* was reopened because the initial IRS regulations did not adequately ensure that tax exemptions were not provided to private schools engaging in racial discrimination. The U.S. District Court for the District of Columbia thus modified the original *Green* order and

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[26] 330 F. Supp. 1150, 1155 (D.D.C. 1971).
[27] 309 F. Supp. 1127, 1140 (D.D.C. 1970).
[28] 330 F. Supp. 1150, 1156 (D.D.C. 1971). IRS News Release, July 10, 1970, *reprinted in Hearings on Proposed IRS Revenue Procedures Affecting Tax-Exemption of Private Schools Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 10 (1979).
[29] 330 F. Supp. 1150, 1163 (D.D.C. 1971).
[30] *Id.* at 1164.
[31] *Id.* at 1164–65.
[32] 330 F. Supp. 1150, 1174 (D.D.C. 1971).
[33] Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979), *rev'd sub nom.*, Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981).
[34] 480 F. Supp. 790, 793 (D.D.C. 1979).
A nonjusticiable complaint is one that is not appropriate for court review.
[35] 656 F.2d 820 (D.C. Cir. 1981).
[36] An order by the Supreme Court ordering the lower court to produce the certified record of a case. The writ indicates a case that the Supreme Court chooses, at its discretion, to hear.
[37] 50 U.S.L.W. 3353 (U.S., filed Oct. 20, 1981), 3467 (U.S., filed Nov. 23, 1981).

injunction to strengthen its enforcement of the nondiscrimination requirement for tax-exempt status.[38] After the *Wright* petitions for *certiorari* were filed, the Department of Justice submitted a memorandum to the Supreme Court in the *Bob Jones* and *Goldsboro* cases on January 8, 1982, to vacate the judgments in those cases. It asserted that those cases should be vacated as moot since the Treasury Department had begun the process for revoking the applicable revenue regulations and procedures and had initiated the process of reinstating the tax exemptions for those institutions.[39] This change in the policy of three previous administrations was the result of a Treasury Department determination, with the advice of the Justice Department, that it lacked the statutory authority to deny tax-exempt status to racially discriminatory private schools.[40]

As a result of the Justice Department's action, the *Green* plaintiffs sought an injunction to prevent the Department of Treasury from revoking, or failing to enforce, the IRS regulations and procedures denying tax-exempt status to racially discriminatory private schools.[41] That motion was denied by the district court on February 4, 1982.[42] However, in the *Wright* case, the U.S. Court of Appeals for the District of Columbia granted a temporary order that prohibited both the Treasury Department and the IRS from granting or restoring tax-exempt status to racially discriminatory private schools. This injunction apparently has nationwide effect.[43]

Based on the circuit court order in the *Wright* case, the Department of Justice filed two motions with the Supreme Court on February 25, 1982. One motion requested leave to file a brief on the merits out-of-time[44] since the Secretary of the Treasury had "determined not to grant or restore tax-exempt status" in light of the *Wright* order, rendering the *Bob Jones* and *Goldsboro* cases no longer moot.[45] The second motion requested that the cases be heard separately and the appointment of counsel to argue as *amicus curiae* in support of the judgments below. This request was made as a result of the stance taken by the United States in the brief it sought to file out-of-time. In that brief, the United States would support the court of appeals decision with respect to the first amendment issues, but it would argue that the fourth circuit made an erroneous statutory interpretation in denying tax-exempt status to racially discriminatory private schools.[46] Both motions were granted by the Supreme Court on April 19, 1982.[47]

The *Green* court was not squarely faced with the question of whether private religious schools that engage in racial discrimination based upon sincerely held religious beliefs are outside the reach of the IRS regulations by virtue of the free exercise clause of the first amendment, nor was it confronted with the question of whether the denial of tax-exempt status to

[38] Green v. Miller, Civ. Action No. 69–1355 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980, unpublished decision).

[39] Memorandum for the United States, Goldsboro Christian Schools Inc. v. United States, No. 81–1, and Bob Jones University v. United States, No. 81–3 (U.S., filed Jan. 8, 1982).

[40] Department of Treasury News Release, Jan. 8, 1982. A public outcry resulted from the change in tax-exempt policy that would allow racially discriminatory private schools, both religious and nonsectarian, to receive such status. On Jan. 18, 1982, the President sent to Congress proposed legislation to explicitly grant the Department of the Treasury and the Internal Revenue Service the authority to deny or revoke tax-exempt status for racially discriminatory private schools (and to deny charitable and other forms of deductions for contributions to such schools) that they purportedly lack under existing revenue law. That same day, the Department of the Treasury announced that it had instructed the IRS not to act on "any applications for tax exemptions filed in response to the Internal Revenue Service's policy announced on Friday, January 8, 1982, until Congress has acted on the proposed legislation." *Treasury News*, Jan. 18, 1982.

[41] Motion to Vacate Stay of Proceedings, to Shorten Time for Response thereto, and for further Injunctive Relief to Enforce Declaratory Judgment and Preserve the Status Quo, Green v. Regan, Civ. Action No. 69–1355 (D.D.C. Jan. 13, 1982).

[42] *See* Motion for Injunction Pending Appeal or in the Alternative for Injunction under "All Writs Act" to Preserve Effectiveness of this Court's Mandate, Wright v. Reagan, No. 80–1124 (D.C. Cir. Feb. 10, 1982).

[43] Wright v. Regan, No. 80–1124 (D.C. Cir. Feb. 18, 1982) (temporary order). On Mar. 24, 1982, the circuit court of appeals issued another order under which the February 18 order would continue in effect if the plaintiffs filed a motion in the district court for similar injunctive relief within 20 days. Upon the filing of such a motion the February 18 order would remain in effect until the district court ruled on the motion for injunction and pending any appeal to the circuit court. Wright v. Regan, No. 80–1124 (D.C. Cir. Mar. 24, 1982) (order). The *Wright* plaintiffs subsequently filed such a motion in the district court. Motion for Order Preserving Status Quo, Wright v. Regan, Civ. Action No. 76–1426 (D.D.C., filed Apr. 13, 1982).

[44] Filing out-of-time means filing after the expiration of the time allowed for filing.

[45] Motion for Leave to File Brief Out-of-Time, Goldsboro Christian Schools v. United States, No. 81–1, and Bob Jones University v. United States, No. 81–3 (U.S., filed Feb. 25, 1982).

[46] Motion for Leave to File Motion for Divided Argument Out-of-Time and Motion for Divided Argument, Goldsboro Christian Schools v. United States, No. 81–1, and Bob Jones University v. United States, No. 81–3 (U.S., filed Feb. 25, 1982).

[47] 50 U.S.L.W. 3837 (U.S. Apr. 19, 1982). The Supreme Court invited William T. Coleman, Jr., former Secretary of Transportation, to brief and argue, as *amicus curiae*, in support of the judgments below. The cases were argued before the Supreme Court of the United States on Oct. 12, 1982.

such racially discriminatory private religious schools violates the establishment clause of the first amendment. Nevertheless, the court did intimate that it was unlikely that the first amendment would shield such private religious schools from the racial nondiscrimination requirement for tax-exempt status:

> We are persuaded that there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation.[48]

Racially Discriminatory Practices of Private Religious Schools and Religious Freedom

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[49] Although that language of the first amendment seeks to erect a wall of separation between government and religious institutions, "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts. . . ."[50] As Chief Justice Burger noted:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[51]

The Constitution does not prohibit parents of school age children from freely choosing to enroll their children in a private educational institution,[52] even when it engages in racial discrimination by excluding nonwhite students,[53] nor does the Constitution forbid governmental units from providing to private schools some forms of assistance that it provides to public schools.[54] But when a private school engages in racial discrimination, the Court has stated clearly:

> [A] State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.[55]

Both Bob Jones University and Goldsboro Christian Schools practice racial discrimination based on a sincerely held religious belief. Because of those practices, the IRS determined that neither school was eligible for tax-exempt status under §501(c)(3) of the Internal Revenue Code. The two schools challenged those adverse agency determinations by filing tax refund suits, as suggested in a prior Supreme Court opinion,[56] alleging that the IRS ruling was contrary to

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[48] Green v. Connally, 330 F. Supp. 1150, 1163. The court further stated:

> We are not now called upon to consider the hypothetical inquiry whether tax exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of religion. Such a problem may never arise; and if it ever does arise, it will have to be considered in the light of the particular facts and issue presented, and in light of the established rule. . .that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them. *Id.* at 1169 (footnotes omitted).

[49] U.S. Const. amend. I.

[50] Walz v. Tax Commission, 397 U.S. 664, 670 (1970).

[51] *Id.* at 669.

[52] Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[53] *See* Norwood v. Harrison, 413 U.S. 455, 461–63 (1973).

[54] Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding a New York statute providing direct payments to private schools—religious and nonsectarian—for costs incurred in complying with State pupil evaluation and reporting requirements); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that there are some "necessary and permissible" contracts). *See also* Norwood v. Harrison, 413 U.S. 455, 465 (1973), where the Court referred to "generalized services" such as police and fire protection that States provide, and stated:

> We do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory.

[55] Norwood v. Harrison, 413 U.S. 455, 462–63 (1973).

[56] Prior to 1970, Bob Jones University had tax-exempt recognition under §501(c)(3) of the Internal Revenue Code. In November 1970, the school received notification of the new Internal Revenue Service (IRS) policy, announced in July 1970, that racially discriminatory private schools would no longer be eligible for tax-exempt status. The university was unsuccessful in its bid to obtain IRS assurance of tax-exempt status in administrative proceedings. As a result, it filed suit in the Federal District Court for the District of South Carolina to prevent the IRS from revoking its tax-exempt status. The district court granted a preliminary injunction in Bob Jones University v. Connally, 341 F. Supp. 277 (D.S.C. 1971), but the U.S. Court of Appeals for the Fourth Circuit reversed, holding that the district court did not have jurisdiction to hear the case. 472 F.2d 903, *reh. denied*, 476 F.2d 259 (4th Cir. 1973). The Supreme Court affirmed the circuit court decision, but noted that the university could obtain review of the revocation of its tax-exempt status in a tax refund lawsuit:

> This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different. . . .[P]etitioner may pay income taxes, or, in their absence, an installment of FICA [Social Security] or FUTA [Federal unemployment] taxes, exhaust the Service's internal

the plain wording of the statute and violated both the free exercise and establishment clauses of the first amendment.

The U.S. Court of Appeals for the Fourth Circuit found no violation of first amendment rights in the IRS denial of tax exemptions to racially discriminatory private religious schools.[57] As to the claim of first amendment protections for the policies of Bob Jones University, the fourth circuit ruled that the governmental interest in eliminating "all forms of racial discrimination—[whether] governmental or private, absolute or conditional, contractual or associational,"[58] outweighs any infringement on the racially discriminatory religious practices or beliefs that the school might suffer from its denial of tax-exempt status. Moreover, the enforcement of the IRS nondiscrimination policy "would not prohibit the University from adhering to its [racially discriminatory] policy."[59]

Although recognizing that the government must try to "maintain an attitude of neutrality toward all religions," the court stated:

> But certain governmental interests are so compelling that conflicting religious practices must yield in their favor. . . .[T]he principle of neutrality embodied in the Establishment Clause [of the First Amendment] does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied.[60]

In addition, the court determined that the IRS rule requiring racially neutral policies by all schools claiming tax-exempt status actually minimizes governmental entanglement with religion:

> [T]he uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief.[61]

The free exercise clause bars the government from interfering with the dissemination of religious ideas[62] or from the "regulation of religious *beliefs* as such."[63] And from its earliest decisions in this area, the Supreme Court has frowned upon governmental actions which force persons to elect between the adherence to a first amendment right and participation in an existing public program.[64] To fail on constitutional grounds, the State statute or governmental action need not specifically target a particular religion, for "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[65] In a recent case the Court stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[66]

The free exercise clause, however, is not without limitation, for "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[67] A neutrally drawn statute based on a valid governmental interest such as the nondiscrimination requirement for tax-exempt status for all private schools, whether religious or nonsectarian, is not unconstitutional merely because its application results in the differential treatment of adherents of various religions or religious beliefs. "The mere fact that [an individual's] religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted."[68] The governmental interest must be "of the

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refund procedures, and then bring suit for a refund. Th[is] review procedur[e] offer[s] petitioner a[n]. . .opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of advance assurance of deductibility. Bob Jones University v. Simon, 416 U.S. 725, 746 (1974).

[57] Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), *rev'd* 468 F. Supp. 890 (D.S.C. 1978); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, No. 80–1473 (4th Cir. Feb. 24, 1981) *per curiam* (unpublished opinion).

[58] 639 F.2d 147, 153 (4th Cir. 1980).

[59] *Id.* at 153.

[60] *Id.* at 154.

[61] *Id.* at 155.

[62] *See* Fowler v. Rhode Island, 345 U.S. 67 (1953); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[63] Sherbert v. Verner, 374 U.S. 398, 402 (1963). *Cf.* United States v. Lee, 102 S. Ct. 1051 (1982).

[64] *See, e.g.*, Everson v. Board of Education, 330 U.S. 1 (1947); Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981).

[65] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[66] Thomas v. Review Board, 450 U.S. 707, 717–18 (1981).

[67] United States v. Lee, 102 S. Ct. 1051, 1056 (1982).

[68] 450 U.S. 707, 718 (1981).

highest order" to warrant encroachment upon free exercise rights."[69]

Where a neutrally drawn statute based on a compelling state interest "of the highest order" makes "an inroad on religious liberty," a recent Supreme Court decision held that such a statute can survive constitutional scrutiny if it meets "the least restrictive means" test. As stated in *Thomas* v. *Review Board:*

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order. . .can overbalance legitimate claims to the free exercise of religion."[70] (footnotes omitted)

The decision of the U.S. District Court for the District of Columbia in *Green* v. *Connally,* which enjoined the IRS from granting tax-exempt status to racially discriminatory private schools, is consistent with this balancing test pronounced by the Supreme Court. The eradication of racial discrimination is a compelling interest "of the highest order." As Judge Leventhal stated in *Green:*

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.[71]

The compelling nature of the government interest in eradicating racial discrimination was reiterated by the fourth circuit in *Bob Jones University* v. *United States.*[72] In fact, the Supreme Court has previously invalidated a State statute barring interracial marriage,[73] a part of the racially discriminatory policies of Bob Jones University.

Bob Jones University and Goldsboro Christian Schools additionally assert that they would be subject to an extreme financial burden if forced to choose between the first amendment right to free exercise and tax-exempt status. On this point, the case of *Braunfeld* v. *Brown* is instructive. The issue in that case was whether Sunday closing laws violated the first amendment rights of Sabbatarians. The Supreme Court held that the State statute did not violate the first amendment, although it did note that the law made the practice of religious beliefs of Sabbatarians more expensive.[74]

Thus, the maintenance of the current IRS nondiscrimination requirement for tax-exempt status carries out a valid governmental interest without infringing upon the first amendment right to free exercise. Private religious schools that engage in racial discrimination based on sincerely held religious beliefs are not prohibited from their right to freely exercise those beliefs, but they are not eligible for Federal tax-exempt status. Even if the nondiscrimination requirement is considered a burden on the free exercise clause, it is justified by the compelling governmental interest in eradicating racial discrimination. Moreover, it meets the "least restrictive means" test of *Thomas* v. *Review Board* because it does not bar the schools from adhering to their religious beliefs, but rather prevents them from obtaining official Federal support for those policies through the grant of a tax exemption. Thus existing case law does not support the view that a nondiscrimination requirement for Federal tax-exempt status violates the free exercise clause of the first amendment.

The Establishment Clause and Tax-Exempt Status

The first amendment also prohibits the Congress from enacting legislation "respecting an establishment of religion."[75] That provision, known as the establishment clause, was designed to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity."[76]

Although it has often been stated that the intent of the establishment clause is to construct a "wall of separation"[77] between government and religion, the Supreme Court has repeatedly stated that no complete separation is possible. As the Court said in *Zorach* v. *Clauson:*

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First

[69] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[70] Thomas v. Review Board, 450 U.S. 707, 718.
[71] Green v. Connally, 330 F. Supp. 1150, 1167 (D.D.C. 1971).
[72] 639 F.2d 147, 153 (4th Cir. 1980).
[73] *See* Loving v. Virginia, 388 U.S. 1 (1967).
[74] Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961).
[75] U.S. Const. amend I.
[76] Walz v. Tax Commission, 397 U.S. 664, 668 (1970).
[77] Everson v. Board of Education, 330 U.S. 1, 16 (1947).

Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter."[78]

In a 1971 decision, the Court, after noting that there were "necessary and permissible contacts" such as "[f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws," stated:

Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[79]

As a result of this construction of the establishment clause, a number of seemingly inconsistent decisions have been handed down by the Supreme Court. This has prompted one recent Supreme Court majority, in upholding a State statute funding private religious and nonsectarian schools for the costs of complying with State student evaluation and reporting requirements, to observe:

This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States. . .produces a single, more encompassing construction of the Establishment Clause.[80]

Despite the apparent disagreement on the Court as to where the line should be drawn with respect to permissible and forbidden government aid to religion under the establishment clause, a three-pronged test has nevertheless evolved from Supreme Court decisions during the last two decades. Constitutionally permissible governmental actions under the establishment clause require that the governmental statute or policy has a clearly secular purpose, has a primary effect that does not advance or inhibit religion, and does not foster excessive entanglement between the government and the religious entity.[81] In the case of the IRS statute and regulations requiring the denial or revocation of tax-exempt status for private schools, whether religious or nonsectarian, that engage in racial discrimination, the first two prongs of the test are satisfied. The IRS policy has a clear secular purpose—the eradication of racial discrimination in education. Governmental entities have "a constitutional obligation [that] requires [them] to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."[82]

Eliminating racial discrimination has been constitutionally mandated since the adoption of the Civil War amendments, the 13th, 14th, and 15th amendments to the Constitution.[83] Since the Supreme Court decision in *Brown* v. *Board of Education*,[84] the Federal Government has enacted numerous laws[85] and devoted substantial resources to eliminate racial discrimination in all areas, not merely in education. A number of Executive orders have been issued by various Presidents to deter and remedy racial discrimination,[86] and executive branch agencies have promulgated and

[78] Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[79] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[80] Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980).

[81] Board of Education v. Allen, 392 U.S. 236, 243 (1968); Walz v. Tax Commission, 397 U.S. 664, 674. The three-pronged test was first clearly articulated by the Court in Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
Because of the seemingly *ad hoc* approach of the Court, this three-pronged test for resolving establishment of religion questions, particularly its "excessive entanglement" prong, has been criticized by some commentators. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Villanova L. Rev. 3 (1978); James A. Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 Law & Contemp. Prob. 143 (Spring 1981).

[82] Norwood v. Harrison, 413 U.S. 455, 467 (1973).

[83] The 13th amendment outlawed slavery and its badges and incidents. The 14th amendment was designed to prevent the abridgement of the "privileges and immunities" of national citizenship; the deprivation of "life, liberty, and property without due process of law"; and the denial of the "equal protection of the laws." The 15th amendment guaranteed black men the right to vote. U.S. Const. amend. XIII–XV.
Though the Civil War amendments came into being more than a century ago, the efforts of the Federal Government to enforce their racial nondiscrimination command has been inconsistent. For a more detailed discussion of the Civil War amendments and their history, see U.S., Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (June 1981).

[84] 347 U.S. 483 (1954).

[85] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified, as amended, at 42 U.S.C. §§2000a–2000f (1976 & Supp. III 1979); Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified at 42 U.S.C. §§1971, 1973–1973bb–1 (1976)); Emergency School Aid Act, Pub. L. No. 95–561, Tit. VI, 92 Stat. 2252 (1978) (codified at 20 U.S.C. §§3191–3207 (Supp. III 1979)).

enforced many regulations that effectively carry out the racial nondiscrimination command of the Constitution and Federal law.[87] The Federal judiciary has repeatedly struck down racially discriminatory governmental actions, noting that eradication of racial discrimination is a compelling governmental interest of the highest order.[88] In fact, the courts have subjected racial discrimination to the strictest scrutiny.[89]

This all-out effort was neither designed nor intended to focus, and in actuality has not focused, solely or primarily on private sectarian schools. Though some private religious schools, through participation in governmentally funded programs and the receipt of governmental benefits, have come under the scrutiny of the Federal Government in its efforts to eliminate racial discrimination,[90] the IRS policy of denying tax exemptions to racially discriminatory private schools has a clearly secular purpose.

The IRS policy also has neither the principal nor primary effect of advancing or inhibiting religion. It is a neutral policy, applicable to all private schools, whether religious or nonsectarian. Its purpose, the eradication of racial discrimination, is akin to that of *Walz* v. *Tax Commission* in which the Supreme Court upheld a State statute authorizing a property tax exemption for property used solely for religious worship, saying that it is "neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility."[91]

Racially discriminatory private religious schools and racially discriminatory nonsectarian schools would be ineligible for tax-exempt status under the IRS policy.[92] Thus, it is argued that the IRS policy is an unconstitutional preference for some religions over others, i.e., it violates establishment clause neutrality by "advancing" racially nondiscriminatory religions and by "inhibiting" religions that engage in racial discrimination based on sincerely held religious beliefs.

That the neutral policy fortuitously aligns itself with some religions and not others does not automatically require its invalidation. An otherwise neutral governmental policy does not violate the establishment clause solely because it indirectly either "happens to coincide or harmonize with the tenets of some or all religions,"[93] or adversely affects one religion more than others.[94] Moreover, as the U.S. Court of Appeals for the Fourth Circuit stated in the *Bob Jones University* case, where a compelling governmental interest of the highest order such as eradicating racial discrimination is concerned:

> The principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied."

The court further noted that the private religious school would not be inhibited or prevented from adhering to and practicing those tenets of its religion that it maintains require racially discriminatory school policies. It stated that "the government's rule would not prohibit the University from adhering to its policy" of opposing and penalizing students who

[87] *See, e.g.*, Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963 Compilation); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 Compilation); Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970 Compilation); Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (July 5, 1978).

[88] *See, e.g.*, 34 C.F.R. §100.1 (1981).

[89] *See, e.g.*, McGlotten v. Connally, 388 F. Supp. 448 (D.D.C. 1972); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978); Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967).

[90] *See, e.g.*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973); Mathews v. Lucas, 427 U.S. 495, 504–06 (1976).

[91] *See, e.g.*, Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd without published opinion*, 529 F.2d 514 (4th Cir. 1975); Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 81–3); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd per curiam*, No. 80–1473 (4th Cir. Feb. 24, 1981) (unpublished opinion), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 81–1).

[92] 397 U.S. 664, 672 (1970).

[93] A separate issue is whether a racially discriminatory private religious school is entitled to greater governmental benefits than a racially discriminatory private nonsectarian school. An affirmative response to that question may be inferred from the Court's statement in Norwood v. Harrison that:

> However narrow may be the channel of permissible state aid to sectarian schools,. . .it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.

413 U.S. 455, 470 (1973). But the overriding governmental interest in eradicating racial discrimination, as discussed here, would seem to dictate a contrary conclusion. *Norwood* does state that such a compelling governmental interest permits the differential treatment of discriminatory and nondiscriminatory private schools. Moreover, the granting of tax-exempt status to racially discriminatory private religious schools but not to racially discriminatory private nonsectarian schools appears to violate the equal protection component of the fifth amendment due process clause and the nonestablishment provision of the first amendment.

[94] McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[95] *Id., See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[96] Bob Jones University v. United States, 639 F.2d 147, 154 (4th Cir. 1980).

either engage in or advocate interracial dating and/or marriage.[96] Bob Jones University and Goldsboro Christian Schools, however, argue that the imposition of a greater financial burden through the resulting tax liability for nonconformity with the Federal policy against racial discrimination also violates first amendment neutrality. In effect, this argument boils down to this: where a government program benefit is provided, it must be provided to all religions.

The first amendment, however, does not require a governmental entity to provide the same financial benefit or burden to all religions. In fact, the Supreme Court, in the Sunday closing law cases, held that an otherwise neutral governmental policy that advances an important governmental interest does not violate the first amendment despite the fact that a greater financial cost results to some religious groups—in those cases Sabbatarians—than others.[97]

It is, however, argued that the Supreme Court decision in *Walz* v. *Tax Commission,* upholding property tax exemptions for religious organizations, supports the granting of tax exemptions to racially discriminatory private sectarian schools as a reasonable accommodation to religion mandated by establishment clause neutrality.[98] *Walz* involved a neutral State statute which provided property tax exemptions to a broad class of educational, religious, and charitable organizations. The issue in that case was whether a neutral statute indirectly benefiting religious organizations was constitutional. The issue did not involve a conflicting, compelling, and constitutionally based governmental interest such as the eradication of racial discrimination. In arguing that *Walz* requires the granting of tax-exempt status, racially discriminatory private religious schools are actually seeking a tax benefit not even available to private nonsectarian schools that engage in racial discrimination. This would seem inconsistent with the neutrality principle because providing tax-exempt status to racially discriminatory private religious schools would effectively "advance" those religions by carving out a special tax exemption category solely for them. As the Supreme Court clearly stated, in discussing *Walz* in *Committee for Public Education & Religious Liberty* v. *Nyquist,* "[s]pecial tax benefits. . .cannot be squared with the principle of neutrality established by the decisions of this Court."[99]

The thorniest establishment clause problems for the IRS policy come from the newest addition to the tripartite test, "excessive entanglement." In adopting that part of the test in *Walz* in 1970, the Supreme Court stated:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. . . .In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.[100]

Answering those questions requires the examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[101]

Private religious schools generally have two purposes—the inculcation of religious values and teachings, and the provision of a secular education. Though it is not true of all private religious educational institutions, it is undisputed that Bob Jones University and Goldsboro Christian Schools emphasize the teaching of religious tenets during educational instruction. Bob Jones University is "dedicated to the teaching and propagation of its fundamentalist religious beliefs" and was established:

> to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures. . . .[102]

Goldsboro Christian Schools, seeking "to provide a private school education in a religious setting," stated similarly in its articles of incorporation that:

> The general nature and object of the corporation shall be to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian

[96] *Id.* at 153–54.
[97] Braunfield v. Brown, 366 U.S. 599, 605 (1961).
[98] Walz v. Tax Commission, 397 U.S. 664.
[99] 413 U.S. 756, 793 (1973).
[100] Walz v. Tax Commission, 397 U.S. 664, 674–75 (1970).
[101] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).
[102] Bob Jones University v. United States, 468 F. Supp. 890, 893–94 (D.S.C. 1978).

religion and the ethics revealed in the Holy Scriptures. . . .[103]

Their identification as religious or religiously affiliated institutions was uncontested in the lower Federal courts adjudicating IRS denial of tax-exempt status to them. The granting of tax-exempt status, and the ability of contributors to claim charitable deductions for donations, to those and similar institutions would undoubtedly make available greater financial resources to them for carrying out the purposes for their establishment. Thus exemption from Federal taxation would provide a clear benefit to those institutions.

Private religious schools seek tax-exempt status under §501(c)(3) of the Internal Revenue Code. The granting of such status (and of charitable deductions for donations by contributors) to racially discriminatory private schools constitutes government aid or involvement between church and State that requires first amendment neutrality. It has been argued that the Supreme Court in *Walz* v. *Tax Commission*[104] supported the proposition that tax exemptions do not constitute government "aid" or involvement with the religious organization seeking exempt status. *Walz* involved the constitutionality of New York City property tax exemptions extended to "religious organizations for religious properties used solely for religious worship."[105] In upholding the exemption, the Court stated that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[106] Notwithstanding that language, however, the Court clearly indicated that the tax-exempt status provides financial benefits to and creates government involvement with the recipient religious institution:

> Either course, taxation of churches or exemption, occasions some degree of involvement with religion. . . . Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.[107]

That the court considered "income tax benefits" sufficient to create the type of church-state contact to raise first amendment problems can also be seen in its decision in *Committee for Public Education & Religious Liberty* v. *Nyquist*.[108] In that case, the Court invalidated a State statute that provided "direct money grants" for maintenance and repair of the physical plant and equipment of parochial schools and tuition reimbursements for parents of parochial school students, and it also struck down a system of income tax benefits for parents of students attending parochial schools, variously referred to as "tax credits," "income tax modifications," "tax deductions," and, like *Walz*, "tax forgiveness."[109]

A similar conclusion was reached by a Federal district court with respect to Federal income tax-exempt status and charitable deductions. That case, *McGlotten* v. *Connally*,[110] involved the challenge of tax-exempt status for, and deductibility of charitable contributions to, fraternal organizations that engage in racial discrimination.[111] The district court, after noting both the rationale for deductibility of charitable contributions and the role of the Federal Government in qualifying organizations and approving their solicitations, held that "the Government has become sufficiently entwined with private parties to call forth a duty to ensure compliance with the Fifth Amendment by the parties through whom it chooses to act."[112]

From these cases it is clear that the granting of tax exemptions and the allowance of tax deductions for contributions to tax-exempt organizations constitute government aid or involvement through the tax system within the meaning of the first amendment.

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[103] Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, 1316 (E.D.N.C. 1977).

[104] 397 U.S. 664 (1970).

[105] *Id.* at 666.

[106] *Id.* at 675.

[107] *Id.* at 674–75.

[108] 413 U.S. 756 (1973).

[109] *Id.* at 789.

[110] 338 F. Supp. 448, 456 (D.D.C. 1972).

[111] In addition, the plaintiff challenged the exemption for "exempt function income" of racially discriminatory nonprofit clubs (all their income, except for this "exempt function income," is taxed at regular corporate rates). The court held that exemption from taxation of such funds did not constitute a grant of Federal funds to the nonprofit club. As it stated:

> Unlike the deduction for charitable contributions, the deduction for "exempt function income" does not operate to provide a grant of federal funds through the tax system. . . .The funds exempted are received only from the members and any "profit" which results from overcharging for the use of the facilities still belongs to the same members. No income of the sort usually taxed has been generated; the money has simply been shifted from one pocket to another, both within the same pair of pants. . . .
>
> [H]owever dysfunctional the "state action" limitation is at a time when the nation has sufficiently matured that the elimination of racial discrimination is a cornerstone of national policy, it still means that Congress does not violate the Constitution by *failing to tax* private discrimination where there is no other act of Government involvement. *Id.* at 458 (emphasis in original).

[112] McGlotten v. Connally, 338 F. Supp. 456–57 (D.D.C. 1972).

Programs of government aid to sectarian institutions violate first amendment neutrality if they involve substantial oversight or administrative relationships between the governmental entity and the religious organization. The excessive entanglement test would prohibit "sustained and detailed administrative relationship[s] for enforcement of statutory or administrative standards"[113] or "comprehensive, discriminating, and continuing state surveillance."[114]

Of course, the establishment clause does not prohibit all administrative relationships between church and state. Religious institutions may be subject to governmental regulation without creating excessive entanglement.[115] And this can be true whether or not government aid is involved.[116] But where the degree of entanglement resulting from a government program of aid involves "state inspection [of expenditures by a religious school on secular education and religious activity] and evaluation of the religious content of a religious organization," it is "fraught with the sort of entanglement that the Constitution forbids."[117]

In *Walz* v. *Tax Commission,* the Supreme Court, in upholding a State statute authorizing a property tax exemption for property used solely for religious worship, stated that such an exemption:

> creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.[118]

Although some argue that *Walz* bolsters the conclusion that the excessive entanglement test requires the granting of Federal income tax exemptions to racially discriminatory private religious schools in the *Bob Jones University* and *Goldsboro Christian Schools* cases, it is distinguishable. *Walz* involved property tax exemptions granted to religious institutions for property used solely for religious purposes; *Bob Jones* and *Goldsboro* involve the issue of whether Federal income tax exemptions should be granted to religious institutions or religiously affiliated institutions performing a secular function—providing educational instruction, though with a religious orientation. *Walz* involved the issue of whether a broad-based, neutral State statute that results in financial benefit to a number of groups, including religious organizations, violates first amendment neutrality; *Bob Jones* and *Goldsboro* involve the issue of whether a broad-based, neutral Federal statute and the accompanying regulations that result in financial benefit to a number of organizations, including some religious institutions, violate the first amendment neutrality principle because the same financial benefit is not extended to all religious organizations. And finally *Walz* involved no conflicting constitutional command other than that inherent in the first amendment, whereas *Bob Jones* and *Goldsboro* involve not only first amendment considerations but also the compelling governmental interest in eradicating racial discrimination embodied in the 5th, 13th, and 14th amendments and in numerous Federal statutes. Thus, *Walz* is neither identical to nor controlling as to the question of Federal tax-exempt status for private religious schools that have racially discriminatory policies.

The administrative oversight required to enforce the nondiscrimination requirement of the Federal internal revenue statute and regulations does not constitute excessive governmental entanglement. As the Supreme Court has stated, the question of whether excessive governmental entanglement exists "is inescapably one of degree."[119] Although the IRS would necessarily have to examine certain objective information to make an administrative determination as to whether a particular organization or institution engages in racial discrimination, that administrative involvement would be far less than the administrative entanglement resulting from agency judgments as to whether a sincerely held religious belief is the basis for the racially discriminatory practices of a private religious school. As a North Carolina Federal district court stated:

> [M]aking qualification under Section 501(c)(3) [for exemption from Federal income taxation] turn upon whether the organization maintains a policy and practice of excluding one or more races is a reasonably objective standard,

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[113] Walz v. Tax Commission, 397 U.S. 664, 675 (1970).

[114] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[115] *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.").

[116] *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[117] Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

[118] 397 U.S. 664, 676 (1970).

[119] Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

whereas the standard the plaintiff [Goldsboro Christian Schools, Inc.] proposes to adopt would require, at a minimum, inquiry into the sincerity of the plaintiff's religious beliefs as it impacts upon the admissions policy.[120]

The Fourth Circuit Court of Appeals echoed this analysis in *Bob Jones University* v. *United States*, stating that "the uniform application of the [nondiscrimination] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief."[121]

Nor would the uniform application of the nondiscrimination rule require the "comprehensive, discriminating, and continuing state surveillance" of the religious content of a teacher's method of instruction to ensure that statutory "restrictions are obeyed and the First Amendment otherwise respected."[122]

An alternative course would be to prohibit the IRS from enforcing the nondiscrimination requirement with respect to private religious schools. Such a course, however, would have dire first amendment consequences. It would mean that the neutrality principle of the establishment clause would require all governmental programs that benefit a religious organization, notwithstanding neutral eligibility requirements for participation, to provide precisely the same benefit to all religious groups. Although the recent Supreme Court decision in *Larson* v. *Valente*[123] may lend some support to that proposition, that case is inapplicable to the issue of tax-exempt status for racially discriminatory private schools, because it involved a statute that expressly granted denominational preferences.

The *Larson* case involved the application of a Minnesota charitable contributions statute that exempted religious organizations from its reporting and registration requirements if they received more than 50 percent of their contributions from members or affiliated organizations. Because the statute granted an express preference to certain religious organizations, the Court stated that the three-pronged establishment test announced in *Lemon* v. *Kurtzman* was inapplicable, for that test applied only "to laws affording a uniform benefit to *all* religions, and not to provisions,. . .that discriminate *among* religions." Statutes granting a preference to certain religious organizations are "suspect" and subject to "strict scrutiny";[124] therefore, they must be "justified by a compelling governmental interest,. . .and. . .closely fitted to further that interest."[125]

The Court, while assuming *arguendo*[126] that the State had "a sufficiently 'compelling' governmental interest" in protecting its citizenry from abusive solicitation practices, held that the use of the arbitrary 50 percent rule was not "closely fitted" to that asserted governmental interest.[127]

Even if *Larson* were applied, the nondiscrimination requirement for tax-exempt status under §501(c)(3) would survive constitutional scrutiny. First, it is justified by a "compelling governmental interest"—the eradication of racial discrimination—embodied in the fifth amendment and the Civil War amendments to the Constitution. Second, it is closely fitted to that purpose, providing a mechanism for the Federal Government to withhold official support of racial discrimination without an absolute prohibition on the exercise of first amendment rights—i.e., while racially discriminatory private schools would be prohibited from receiving government aid through the tax system, they would not be prohibited from freely adhering to racially discriminatory policies based on a sincerely held religious belief.

Despite the inapplicability of *Larson* to the tax exemption issue, its holding clearly indicates that the first amendment does not require governmental actions benefiting some religious organizations to equally benefit all religious organizations. Where there is a "compelling governmental interest," and the governmental action is "closely fitted to further that interest," the governmental action is constitutional. To hold otherwise would mean that first amendment interests outweigh all other interests of the highest order, such as the eradication of racial discrimination.

It thus appears that the nondiscrimination requirement for tax-exempt status does not conflict with the religion clauses of the first amendment. To grant tax exemptions to racially discriminatory private religious schools would require the IRS to violate the constitutional command that the Federal Government not aid racial discrimination. Moreover, as one constitutional

[120] Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, 1320 (E.D.N.C. 1977).
[121] 639 F.2d 147, 155 (4th Cir. 1980).
[122] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). *See also* Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472, 481–82 (1973).
[123] 102 S. Ct. 1673 (1982).
[124] 102 S. Ct. 1673, 1684.
[125] 102 S. Ct. 1673, 1685.
[126] In arguing, in the course of the argument; a statement or observation made by a judge as a matter of argument or hypothetical illustration is said to be made arguendo.
[127] 102 S. Ct. 1673, 1685–87.

scholar pointed out during the 1979 congressional hearings on tax-exempt status for private schools, there are other first and fifth amendment problems:

> [T]o exempt religious private schools from the substantive reach of antidiscrimination principles and procedures would violate both the equal protection component of the Fifth Amendment's due process clause and the anti-establishment component of the First Amendment's religion clauses. . . .
>
> The public choice to extend tax benefits to religious schools and other institutions is constitutionally acceptable only because it does not single out religious bodies as such for favorable treatment but instead benefits them as part of "a broad class of property owned by nonprofit, quasi-public corporations, which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). The moment church-related or otherwise religious institutions are bestowed with tax benefits unavailable to secular bodies similarly situated, the line delicately drawn in *Walz* is crossed. To extend tax benefits to religious institutions free of the anti-discrimination requirements enforced against the secular counterparts of such institutions would amount to forbidden aid to religion, and forbidden discrimination against the non-religious.[128]

Statutory Construction of §501(c)(3) of the Internal Revenue Code of 1954

The other major question presented by the issue of tax-exempt status for racially discriminatory private religious schools is the proper construction of §501(c)(3) of the Internal Revenue Code of 1954.[129] More precisely, the question is whether the national policy against Federal support for racial discrimination is a proper limitation on the categories of organizations to which the Internal Revenue Service may grant tax-exempt status, notwithstanding the absence of explicit language within the statute as to that requirement.

The question of tax exemptions for racially discriminatory private religious schools involves not merely a national policy of racial nondiscrimination expressed in other Federal statutes but one that is embodied in the fifth amendment and the Civil War amendments to the Constitution. An important rule of statutory construction is that statutes should be interpreted to avoid constitutional difficulties,[130] for there is a presumption that the legislative body "acted with integrity and with an honest purpose to keep within constitutional limits."[131] Thus, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[132] The importance of this principle is underscored by the words of Chief Justice Marshall in *Marbury* v. *Madison:*

> [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions.[133]

In interpreting statutes to avoid "grave doubts" about their constitutionality, the courts have historically examined extrinsic materials such as the relevant agency's interpretation. It is a well-recognized rule of statutory construction that the construction of a statute by the agency designated to administer and enforce it is entitled to great deference unless clearly erroneous.[134] In this case, the 1970 IRS interpretation construed §501(c)(3) as requiring racial nondiscrimination for tax-exempt status. At that time, the IRS stated that "it can no longer legally justify allowing tax-exempt status to private schools which practice

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[128] *Hearings on Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 365, 371 (1979) (statement of Laurence H. Tribe, professor of Law, Harvard University).

[129] When dealing with issues of statutory construction, it is perhaps helpful to remember these words of Justice Frankfurter:

> Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. . . .They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. . . .

United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 221 (1952) (citations omitted).

[130] *See, e.g.*, United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (Federal statute providing for military court-martials construed to not encroach on Article III Federal court jurisdiction over trials of civilians, including ex-servicemen).

[131] C. Dallas Sands, ed., *Sutherland Statutory Construction* (4th ed. 1973), vol. 2A, §45.11 (p. 33).

[132] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

[133] 5 U.S. (1 Cranch) 137, 176–78 (1803).

[134] *See* Udall v. Tallman, 380 U.S. 1, 16 (1965); Zemel v. Rusk, 381 U.S. 1, 11 (1965) ("The interepretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute.")

racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes."[135] In reaching this conclusion, the Internal Revenue Service stated:

> Under common law, the term "charity" encompasses all three of the major categories identified separately under section 501(c)(3) of the Code as religious, educational, and charitable. Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being "organized and operated exclusively for religious, charitable,. . . .or educational purposes" was intended to express the basic common law concept. Thus, a school asserting a right to the benefits provided for in section 501(c)(3) of the Code as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section. That Congress had such an intent is clearly borne out by its description in section 170(c) of the Code of a deductible gift to "a corporation, trust, fund, or foundation. . .organized and operated exclusively for educational purposes" as a "charitable contribution."
>
> The Service has followed this concept, as is reflected in Rev. Rul. 67–325, C.B. 1967–2, 113, 116–117, which reads:
>
> > . . .[S]ections 170, 2055, 2106, and 2522 of the Code, to the extent they provide deductions for contributions or other transfers to or for the use of organizations organized and operated exclusively for charitable purposes, or to be used for charitable purposes, do not apply to contributions or transfers to any organization whose purposes are not charitable in the generally accepted legal sense or to any contribution for any purpose that is not charitable in the generally accepted legal sense. *For the same reasons, section 501(c)(3) of the Code does not apply to any such organization.* . . .
>
> All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy. This principle has been stated as follows in the *Restatement (Second), Trusts* (1959) Sec. 377, Comment c:
>
> > A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid.
>
> Although the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law,. . .[d]evelopments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. Titles IV and VI, The Civil Rights Act of 1964,. . .and *Brown* v. *Board of Education*,. . .and many subsequent Federal court cases, demonstrate a national policy to discourage racial discrimination in education, whether public or private. . . .
>
> Therefore, a school not having a racially nondiscriminatory policy as to students is not "charitable" within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.[136]

This interpretation, however, conflicts with the 1982 announcement of the Department of Treasury, with the advice of the Department of Justice, that "the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions in question is not supported by the language of the Internal Revenue Code or its legislative history."[137] Given these conflicting views, an examination of the legislative history is required.

Although the tax-exempt provisions have existed since the enactment of the Tariff Act of 1894, they have a spartan legislative history. The tax-exemption provisions of the revenue laws have been revised on a number of occasions without congressional discussion or explanation of the revisions, both expanding the category of eligible groups and explicitly incorporating various common law restrictions on charitable trusts (e.g., no part of the net income of the organization could inure to the benefit of a private individual). There was no discussion of racial nondiscrimination as a requirement for tax-exempt status. That question is of recent vintage, a product of the civil rights movement of the 1960s. A number of lawsuits have challenged tax-exempt status for racially discriminatory organizations under either State or Federal revenue laws.[138]

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[135] IRS News Release, July 10, 1970, *reprinted in Hearings on Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools Before the Subcomm. on Oversight of the the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 10 (1979).

[136] Rev. Rul. 71–447 (emphasis supplied), *reprinted in Hearings on Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 11–12 (1979). The term "charity" is defined in the IRS regulations as inclusive of "advancement of religion" and "advancement of education." *See* 26 C.F.R. §1.501(c)(3)–1(d)(2)(1981).

[137] *Treasury News*, Jan. 8, 1982.

[138] *See, e.g.*, Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.*, Coit v. Green, 404 U.S. 997 (1971); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972); Falkenstein v. Department of Revenue, State of Oregon, 350 F. Supp. 887 (D. Ore. 1972); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974); Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 81–3); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd per curiam*, No. 80–1473 (4th Cir. Feb. 24, 1981) (unpublished

The spate of litigation has resulted in greater congressional awareness of the issue. The Congress, however, has not expressly ratified the 1970 agency construction of the statute, although it has had the opportunity to do so.

Neither has the Congress disavowed that interpretation. The Ashbrook and Dornan riders to the 1980 Treasury Appropriations Act do not reject the agency construction of the statute. Those appropriations riders only limit the IRS from implementing further regulations to enforce the nondiscrimination requirement for tax-exempt status. The Ashbrook amendment prohibits the IRS from adopting or implementing revenue procedures concerning the tax-exempt status of religious or nonsectarian private schools unless they were in effect prior to August 22, 1978.[139] The Dornan amendment specifically prohibited the implementation of two proposed revisions to IRS regulations promulgated prior to August 22, 1978.[140]

Nor do recent enactments incorporated into the Fiscal Year 1982 Continuing Resolution Act[141] indicate an express disavowal of the 1970 IRS interpretation of §501(c)(3). Prior to the passage of the FY 1982 continuing resolution, the House of Representatives passed H.R. 4121, the Fiscal Year 1982 Treasury-Postal Service Appropriations bill. That bill included a provision similar to the Dornan amendment, prohibiting the expenditure of funds to implement the revised IRS regulations on tax-exempt status for racially discriminatory private schools, whether religious or nonsectarian. It also included a provision similar to the Ashbrook amendment prohibiting the adoption or implementation of any revenue procedure that may result in the loss of tax-exempt status to religious or nonsectarian private schools unless the IRS procedure was in effect prior to August 22, 1978. The bill also included an additional stipulation prohibiting the IRS from using funds appropriated under the bill to enforce post-August 22, 1978, court orders that would also result in the loss of tax-exempt status for such schools.[142]

On the other hand, the Congress in 1976 explicitly adopted a nondiscrimination requirement for certain private clubs seeking tax-exempt status and, in so doing, responded to the decision of the U.S. District Court for the District of Columbia in *McGlotten* v. *Connally,* holding that the constitutional prohibition of Federal support of racial discrimination was not applicable to the "exempt function income" (i.e., charges to the membership for use of club facilities) of §501(c)(7) private clubs.[143]

In adopting that requirement for social clubs seeking tax-exempt status under §501(c)(7), the Senate report stated that the change was necessitated by "national policy":

> In view of national policy, it is believed that it is inappropriate for a social club or similar organization described in section 501(c)(7) to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion.[144]

In expressly applying a racial nondiscrimination requirement to §501(c)(7) social clubs, the Congress referred to the decisions in *Green* (and its affirmation by the Supreme Court), barring tax-exempt status to private educational institutions that engage in racially discriminatory conduct, and *McGlotten,* barring tax-exempt status to fraternal organizations that engage in racial discrimination.[145] Although the congressional action regarding social clubs is not an express congressional statement of support for the nondiscrimination requirement for §501(c)(3) tax-exempt status adopted by the agency in 1970, any more than the Ashbrook and Dornan appropriations riders are an explicit disavowal of that statutory interpretation, it is implied recognition that a racial nondiscrimination requirement is an appropriate limitation on the grant of such status by the Internal Revenue Service.[146]

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opinion), *cert. granted,* 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 81-1).

[139] Treasury, Postal Service, Government Appropriations Act of 1980, Pub. L. No. 96-74, §103, 93 Stat. 559, 562 (1979).

[140] *Id.,* §615, 93 Stat. 559, 577.

[141] Act of Dec. 15, 1981, Pub. L. No. 97-92, §101(a)(1), 95 Stat. 1183 (1981).

[142] H.R. 4121, §616, 97th Cong., 1st Sess. (1981). The restriction as to court orders would presumably apply to the 1980 modification of the *Green* injunction, which incorporated parts of the proposed revenue procedures of Aug. 22, 1978, and Feb. 13, 1979.

[143] 338 F. Supp. 448, 457-59 (D.D.C. 1972).

[144] S. Rep. No. 94-1318, 94th Cong., 2d Sess. (1976), *as reprinted in* 1976 U.S. Code Cong. & Ad. News 6051, 6058.

[145] *Id.;* H. Rep. No. 94-1353, 94th Cong., 2d Sess. (1976).

[146] Even if that action does not rise to the level of congressional intent to impose a nondiscrimination requirement, the Constitution requires the construction of the statute within the bounds of the fifth amendment. As stated earlier in the text, there is a presumption that when the Congress enacts legislation it is acting within constitutional limits. And although not directed by explicit statutory language from Congress, an executive agency administering a Federal statute is bound by the limits imposed by the Constitution. *See,e.g.,* enforcement of the Immigration and Nationality Act is limited by the fourth amendment prohibition against unreasonable searches and seizures.

Interpreting §501(c)(3) of the Internal Revenue Code literally,[147] however, would result in the frustration of "a cornerstone of national policy,"[148] the eradication of racial discrimination. A literal construction of §501(c)(3) would also require the conclusion that Congress intended to ignore the obligation of the Federal Government under the fifth amendment to refrain from supporting racial discrimination. Neither of these results is required by other existing rules of statutory construction.

Decisions of the Supreme Court "have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute,. . .for 'literalness may strangle meaning'[.]"[149] Interpretations that are the product of "arid literalism" should be avoided.[150] Indeed, in interpreting revenue laws, there is a rule of statutory construction that a statute should not be interpreted in such a way as to frustrate clearly defined national or State policies prohibiting certain conduct. The Federal courts have disallowed a number of claims for deductions from Federal income taxation which conflicted with other Federal laws or regulations or with State law.[151] A leading case in this area, cited in *Green* v. *Connally*, *Bob Jones University* v. *United States*, and *Goldsboro Christian Schools, Inc.* v. *United States*, is the Supreme Court decision in *Tank Truck Rentals, Inc.* v. *Commissioner of Internal Revenue*.[152] That case involved the IRS denial of business deductions for the payment of fines assessed on the company during the 1951 tax year for 718 willful and 28 innocent violations of State maximum weight laws. The applicable section of the Internal Revenue Code provided: "In computing net income there shall be allowed as deductions. . .[a]ll the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."[153] Although expenditures for the payment of such fines had been allowed prior to 1950, the IRS changed its policy on permitting those deductions. Tank Truck Rentals, notwithstanding the change in IRS policy, continued to ignore compliance with State maximum weight laws because it could not "operate profitably and also observe the Pennsylvania law."[154] For the tax year 1951, the company claimed $41,060.84 in deductions for the 746 violations of the State maximum weight laws. The Supreme Court agreed with the IRS and the Tax Court, holding that claimed deductions of that

[147] In addition to constitutional mandates, policy considerations, and deference to agency interpretation, there are also rules of a more routine nature that apply in interpreting a statute. For example, when interpreting a Federal statute, one must also look to "the language employed by Congress." Reiter v. Sonotone Corporation, 442 U.S. 330, 337 (1979). If the statute is ambiguous or unclear, the courts may resort to extrinsic aids to find the proper construction of the statute, consistent with legislative intent. United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 221 (1952). But where the statutory language clearly expresses the legislative intent, that construction of the statute ordinarily will be upheld. The courts have so held even where a different construction would harmonize the statute with other legislative enactments. *See, e.g.*, Harris v. Commissioner of Internal Revenue, 178 F.2d 861, 862 (2d Cir. 1949) (court refused to construe Federal gift tax provisions *in pari materia* (relate to the same thing, or have a common purpose) with Federal estate tax provisions).

Section 501(c)(3) of the Internal Revenue Code specifies eight categories of organizations that are eligible for tax-exempt status—"religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition. . ., or for the prevention of cruelty to animals." I.R.C. §501(c)(3). The listing of those eligible categories of organizations in the disjunctive would appear to indicate that "educational" and "religious" are separate and distinct from "charitable." Indeed, the IRS regulations promulgated under the statute seem to fortify this conclusion:

> Since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. If, in fact, an organization is organized and operated exclusively for an exempt purpose or purposes, exemption will be granted to such an organization regardless of the purpose or purposes specified in its application for exemption. . . .

26 C.F.R. §1.501(c)(3)–1(d)(1)(iii)(1981). This is, of course, at odds with the 1970 IRS revenue ruling in which the agency interpreted its mandate under §501(c)(3) to prohibit the granting of tax-exempt status to racially discriminatory private schools. That longstanding agency interpretation, followed by three administrations, stood until its recent revocation in January 1982 by the Department of the Treasury.

[148] McGlotten v. Connally, 338 F. Supp. at 458.

[149] Lynch v. Overholser, 369 U.S. 705, 710 (1962) (citations omitted) ("mandatory commitment" provision of the District of Columbia Code applies only to a defendant in a criminal proceeding who has interposed a defense of insanity and been acquitted on that basis, and not to a defendant who has maintained that mental illness was not responsible for the crimes committed).

[150] Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 245 (1964).

[151] *See,e.g.*, Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326 (1941) (lobbying expenses contrary to Federal lobbying statute); Clarke v. Haberle Crystal Springs Brewing Company, 280 U.S. 384 (1930) (no deduction for "exhaustion, including obsolescence, of. . .good will" as a result of prohibition amendment to the Constitution under revenue law provision for deductibility of "reasonable allowances for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence"); (5th Cir. 1945) (no deduction for payment of penalties for violations of State antitrust laws); Great Northern Railway Company v. Commissioner, 40 F.2d 372 (8th Cir. 1930) (no deduction allowed for payments for violation of Federal statutes or regulations).

[152] 356 U.S. 30 (1958).

[153] *Id.* at 31, n. 1, quoting the Internal Revenue Code of 1939, §23(a)(1)(A).

[154] 356 U.S. 30, 32 (1958).

nature can properly be denied where "allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof."[155] In ruling that there is a "presumption against congressional intent to encourage violation of declared public policy," the Court stated:

> [J]udicial deference to state action requires, whenever possible, that a State not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State. To allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance. This could only tend to destroy the effectiveness of the State's maximum weight laws.[156]

Conclusion

The decisions of the Supreme Court and lower Federal courts make it beyond question that the eradication of racial discrimination, particularly in the area of education, is a compelling governmental interest of the highest order. That this national policy is embodied not only in various Federal statutes as well as the fifth amendment and the Civil War amendments is also clear. To allow tax-exempt status to racially discriminatory private schools, whether religious or nonsectarian, would be contrary to the furtherance of that constitutional objective.

[155] *Id.* at 33–34. In situations where there is not a specific statute or governmentally declared policy, the courts have held that a deduction will not be denied because of "the mere fact that an expenditure bears a remote relation to an illegal act." Commissioner v. Heininger, 320 U.S. 467, 474 (1943). *See also* Lilly v. Commissioner, 343 U.S. 90, 97 (1952); Commissioner v. Tellier, 383 U.S. 687 (1966). That, however, is not the situation with respect to the tax exemption issue as there are constitutional provisions and numerous Federal statutes clearly establishing a national policy against racial discrimination.

[156] 356 U.S. 30, 35 (1958).